Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 31-628 OF 1986
JAMES FOONG J
25 NOVEMBER 1992

Civil Procedure *— Order for sale — Setting aside — Irregularities in the application for order for sale and affidavits filed in support — Whether irregularities would entitle defendant to set aside order for sale ex debito justitiae — Whether irregularities could be cured — Rules of the High Court 1980 O 2, O 83 rr 2(3), (4), 3(3) & (7)*

Civil Procedure *— Order for sale — Setting aside — Reasonable time in bringing application — When time starts to run — Rules of the High Court 1980 O 2 r 2(1)*

Land Law *— Sale of land — Application to set aside order for sale of land — Non-disclosure of exact amount and interest due under the charge — Whether non-disclosure would render an order for sale to be set aside — National Land Code 1965 s 266*

An order for sale was granted by the court in default of appearance of the defendant. Subsequent thereto, the defendant was wound up and its affairs were initially taken over by the official assignee appointed as the provisional liquidator up to 1 June 1992, when the private liquidator took over the affairs of the defendant from the provisional liquidator. The private liquidator, on behalf of the defendant, applied to set aside the said order for sale on the grounds of errors and non-compliance with existing rules and regulations in respect of the said order for sale. The plaintiffs' counsel, though admitting that there were irregularities, argued that they could be cured under O 2 of the Rules of the High Court 1980 ('the Rules') and that the defendants' application to set aside the order for sale made after a lapse of six years, was not made within reasonable time.

Held, allowing the application:

(1) Order 83 r 2(4) of the Rules specifically insisted that the adjourned hearing date be made known to the defendants, thereby granting it an opportunity to be heard. Here, the plaintiffs had failed to issue and serve on the defendants a notice of appointment for the adjourned hearing and this amounted to the deprivation of the defendants' fundamental right to be heard and as such, the defendants would be entitled to an order to set aside the judgment ex debito justitiae. It is the duty of the plaintiff and not the duty of the court to inform the defendant of the adjourned date.

(2) Non-compliance with O 83 rr 3(3)(c) and (7) of the Rules deprived the defendants of the knowledge of the exact amount outstanding and interest due under the charge. This was fundamental as the charge of the defendants' property to the plaintiffs

is related to loans granted to the defendants. The defendants must be offered every opportunity to repay the said loan before its property is taken from the defendants for good. The non-disclosure to the defendants of the exact amount and interest due at relevant dates, is a failure to comply with statutory requirements that is so serious as to render an order so made therefrom to be set aside.

(3) Order 2 r 2(1) of the Rules clearly provides for reasonable time in bringing the application 'after becoming aware of the irregularity'. As the defendants' private liquidator was only recently appointed and he only became aware of the irregularity after his appointment, this application for setting aside, although brought some six years later, is with merits and in compliance with the Rules.

[**Bahasa Malaysia summary**

Satu perintah jualan telah diberikan oleh mahkamah akibat keingkaran defendan memasukkan kehadiran. Selepas itu, defendan telah digulung dan urusannya telah mula-mulanya diambil alih oleh pegawai pemegang serah hak yang dilantik sebagai likuidator sementara sehingga 1 Jun 1992, apabila likuidator persendirian mengambil alih urusan defendan dari likuidator sementara itu. Likuidator persendirian, bagi pihak defendan, memohon untuk mengetepikan perintah jualan tersebut atas alasan kesalahan dan ketakpatuhan kaedah-kaedah dan peraturan yang sedia ada berkenaan dengan perintah jualan itu. Peguambela plaintif, walaupun mengaku bahawa terdapat salah aturan, berhujah bahawa mereka boleh diperbaiki di bawah A 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan bahawa permohonan defendan untuk pengetepian perintah jualan itu selepas enam tahun telah berlalu tidaklah dilakukan dalam tempoh masa yang berpatutan.

Diputuskan, membenarkan permohonan itu:

(1) Aturan 83 k 2(4) KMT khususnya menegaskan bahawa defendan mesti diberitahu tarikh pembicaraan yang ditangguhkan supaya memberikannya peluang didengar. Di sini, plaintiff telah gagal mengeluarkan dan menyampaikan kepada defendan satu notis penetapan tarikh untuk pembicaraan yang ditangguhkan itu. Ini menyebabkan defendan kehilangan hak asasinya untuk didengar dan oleh itu defendan berhak mendapat perintah mengetepikan penghakiman itu ex debito justitiae. Adalah menjadi tugas plaintif dan bukan tugas mahkamah untuk memberitahu defendan tentang tarikh pembicaraan yang ditangguhkan itu.

(2) Ketakpatuhan A 83 kk 3(3)(c) dan (7) KMT menyebabkan defendan tidak mengetahui akan jumlah terperinci yang belum dijelaskan dan faedah yang kena dibayar di bawah cagaran itu. Ini adalah penting kerana cagaran harta defendan kepada plaintif adalah bersangkutan dengan pinjaman yang diberikan kepada defendan. Defendan mesti diberi setiap peluang untuk membayar pinjaman itu sebelum harta itu diambil daripadanya untuk selama-

lamanya. Kegagalan memberitahu defendan jumlah dan faedah terperinci yang kena dibayar pada tarikh-tarikh yang relevan adalah kegagalan mematuhi kehendak statutori yang begitu serius sehingga menyebabkan satu perintah yang dibuat berikutan daripadanya patut diketepikan.

(3) Aturan 2 k 2(1) KMT memperuntukkan dengan jelas masa yang munasabah untuk membawa tindakan 'setelah menyedari luar aturan itu'. Oleh kerana likuidator persendirian defendan cuma dilantik baru-baru ini dan beliau cuma mengetahui akan salah aturan itu selepas perlantikannya, permohonan untuk pengetepian ini, walaupun dibawa lebih kurang enam tahun terkemudian, mempunyai asas dan adalah mengikut KMT.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02–33/93.]

Notes

For cases on application to set aside an order for sale, see 8 *Mallal's Digest* (4th Ed) paras 1916–1917.

Cases referred to

1 *White v Weston* [1968] 2 QB 647 (refd)
2 *Malayan Banking Bhd v Dagang Bina Sdn Bhd* [1991] 3 CLJ 1739 (folld)

Legislation referred to

National Land Code 1965 s 266
Rules of the High Court 1980 O 2 r 2(1), O 83 rr 2(3), (4), 3(3), (7)

David Hoh (*Lim & Hoh*) for the defendants.
A Navamani (*TS Chong & Co*) for the plaintiffs.

Cur Adv Vult

James Foong J: This is an application by the defendants, by way of summons-in-chambers (encl 64) for, inter alia, an order to set aside an order for sale granted by this court on 2 December 1986.

The said order for sale was granted by Mr Justice Shanker in the absence of the defendants, though duly served with an originating summons in a foreclosure proceeding instituted by the plaintiffs (encl 1). Subsequent to the said order for sale, the defendants were wound up in pursuance to a winding up petition. Its affairs were initially taken over by the official assignee appointed as the provisional liquidator. Only from 1 June 1992, did the private liquidator, who now files this application on behalf of the defendants, take over the affairs of the defendants from the provisional liquidator.

After taking over its affairs, the private liquidator of the defendants realized that there were errors and non-compliance with existing rules and regulations in the plaintiffs' foreclosure application (encl 1) and, their

affidavits filed in support. Due mainly to these reasons, the defendants are seeking to set aside the said order for sale. A

The main errors and non-compliance are as follows:

(1) *Non compliance with O 83 r 2(3) of the Rules of the High Court 1980*

As submitted by the defendants' counsel, O 83 of the Rules of High Court 1980 ('the Rules') is the governing rule for foreclosure actions leading to an order for sale of charged properties as stated in s 256 of the National Land Code 1965 and its subsequent related sections. B

Order 83 r 2(3) states as follows:

> Where the plaintiff claims delivery of possession there must be indorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendant to deliver up to the plaintiff possession of the charged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends to apply for at the hearing. C

According to the defendants' counsel, the plaintiffs' affidavit (encl 2) filed in support of their application for foreclosure proceeding of the defendants' property, bears no endorsement on the outside fold about a claim for vacant possession. However, in the plaintiff's originating summons for foreclosure (encl 1) there is such a claim for vacant possession. As such, the plaintiffs have failed to comply with O 83 r 2(3) of the Rules. D E

(2) *Non-compliance with O 83 r 2(4) of the Rules*

Order 83 r 2(4) states as follows:

> Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing. F

According to the defendants' counsel, the first hearing date of the originating summons for foreclosure was made known to the defendants. However, on the said date, the hearing of this plaintiffs' application was postponed and a subsequent date, ie 2 December 1986 was fixed by the court. The plaintiffs failed to inform the defendants of this new hearing date by failing to serve a notice of appointment as provided for under the aforesaid rules. G

Further, the plaintiffs also failed to serve any subsequent further affidavits on the defendants before the hearing of the next adjourned date. H

(3) *Non-compliance with O 83 r 3(3) and O 83 r 3(3)(c)*

Order 83 r 3(3) states as follows: I

> Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of —

A (a) the amount of the advance;
(b) the amount of the repayments;
(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
(d) the amount remaining due under the charge.

B According to the defendants' counsel there are two further affidavits filed by the plaintiffs (encls 8 and 10 respectively) besides the first affidavit (encl 2) of the plaintiffs filed in support of their foreclosure application.

In the plaintiffs' first affidavit (encl 2), the amount stated to be owing was as at 25 April 1986 while this said affidavit was affirmed on 30 June 1986. This is in contravention to O 83 r 3(3)(c) above where, the amount C owing should be as at the date of issue of the originating summons for foreclosure which was 6 July 1986 and the date of the said affidavit which was 30 June 1986.

Proceeding further, as submitted by the defendants' counsel, the subsequent affidavit (encl 8) was affirmed on 19 November 1986. However, in D para 3 of this affidavit, the amount stated due and owing was calculated as at 24 November 1986.

Again, in the affidavit (encl 10) which was affirmed on 25 November 1986, the sum stated therein as due and owing by the defendants was RM1,565,884.66 calculated as at 1 December 1986.

All the amount stated never corresponded with the requirement of O 83 E r 3(3)(c) which requires that the amount owing should be as at the date of the said affidavits.

Order 83 r 3(7)

F This rule states as follows: 'Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.'

In all the three plaintiffs' said affidavits filed in support of the foreclosure proceeding, it was never stated therein 'the amount of a day's interest'.

Based on the aforesaid, the defendants' counsel argued that there were irregularities which would entitle the defendants to set aside the order for G sale as of right; 'ex debito justitiae'.

The plaintiffs' counsel, although admitting that there were irregularities as mentioned, submitted that they could be cured under O 2 of the Rules. Further, the plaintiffs' counsel alleged that the defendants did not make this application to set aside within a reasonable time. From the date of the said order for sale to the date of this application to set aside, a lapse of approxi- H mately six years had passed.

After careful consideration of the respective submissions by both parties, I find that the right to set aside a judgment ex debito justitiae relates to judgment obtained 'irregularly'. Such irregularity often solely affects the deprivation of the rights of one party of being heard, as in cases of non- I service of the relevant summons on the defendants. Under these circumstances, the defendants are entitled as of right for it to be set aside with no terms whatsoever attached thereto. (See the case of *White v Weston*[1] where the Court of Appeal rejected an imposition by the lower court of 'costs in cause' on the setting aside order). Further, in an application to set aside a

judgment ex debito justitiae, the applicant is not required to disclose that he has a defence on merits or that, there is an arguable or triable issue. A

In this respect, I shall refer to the assertion by the defendants of the non-compliance of O 83 r 2(4) by the plaintiffs. Subsequent to the postponement of the first hearing date by the court, the plaintiffs failed to issue and serve on the defendants a notice of the appointment for the adjourned hearing. Such being the case, I find that the defendants were deprived of B their rights to be heard for lack of knowledge as to when the next hearing date was. Though the defendants failed to attend at the first hearing date, O 83 r 2(4) of the Rules specifically insisted that the adjourned hearing date be made known to the defendants thereby granting them an opportunity to be heard. Failure to comply with this would amount to the deprivation of C a party's fundamental right to be heard and, as such, would be entitled to an order to set aside the judgment ex debito justitiae.

This court cannot accept the argument of the plaintiffs' counsel that it should be the duty of the court to inform the defendants of the adjourned date. Order 83 r 2(4) of the Rules imposes no such duty upon the court to inform the defendants of the adjourned date. In fact, this particular rule D itself clearly and explicitly states that it should be the duty of the plaintiffs to do so by the use of the following words: 'the plaintiff must serve notice of appointment for the adjourned hearing'.

In respect of the non-compliance by the plaintiffs of the other rules of the High Court, I find that breach of these rules, though an irregularity as E stated in O 2 r 1 of the Rules, is so fundamental as to entitle the defendants to set aside the said judgment order obtained against them.

The non-compliance with O 83 r 3(3)(c) and (7) of the Rules in this case, deprives the defendants of the knowledge of the exact amount outstanding and interest due under the charge. This is fundamental, as the F charge of the defendants' property to the plaintiffs are related to loans granted to the defendants. The defendants must be offered every opportunity to repay the said loan before his property, which is only a security, is taken from him for good. This opportunity for repayment, as seen in s 266 of the National Land Code 1965, extends even to 'any time before the conclusion of the sale' by public auction subsequent to an order of sale by G the court. The non-disclosure to the defendants of the exact amount and interest due at relevant dates, is a failure to comply with statutory requirements that is so serious as to render an order so made therefrom to be set aside.

I am in full agreement with Mr Justice Razak's decision in *Malayan Banking Bhd v Dagang Bina Sdn Bhd*[2] where an order for sale in a foreclosure proceeding was not allowed due to the failure of the plaintiffs' bank in H complying with O 83 r 3(3) of the Rules, to disclose the amount of any interest or instalment in arrears at the date of issue of their originating summons and at the date of their affidavit.

In this case before me, not only was there non-compliance of one rule I but, so many other rules that are so fundamental and of essence to the whole proceeding relating to foreclosure.

As to the question of delay in bringing this application to set aside, I find no merits in the plaintiffs' argument on this point. Order 2 r 2(1) of the

A Rules clearly provides for reasonable time in bringing this application 'after becoming aware of the irregularity'. I find that the defendants' private liquidator was only recently appointed and, I am satisfied from his affidavit that he only became aware of this irregularities after his appointment. Such being the case, this application for setting aside, although brought some six years later, is with merits and in compliance with the Rules.

B I therefore allow the defendants' application to set aside the order for sale dated 2 December 1986 with costs.

Application allowed.

C Reported by Yap Foo Ken

D

E

F

G

H

I